Supreme Court, U.S.
FILED
MAY 28 2002
OFFICE OF THE CLERK

No. 01-7662

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

JIM MARCUS
Counsel of Record
ELIZABETH DETWEILER
ANDREW HAMMEL
TEXAS DEFENDER SERVICE
412 Main Street
Suite 1150
Houston, TX 77002
(713) 222-7788

SETH P. WAXMAN
DAVID W. OGDEN
ROBIN A. LENHARDT
TREVOR W. MORRISON
NICOLE C. HERRON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Petitioner

QUESTION PRESENTED

Did the Court of Appeals err in denying a certificate of appealability and in evaluating petitioner's claim under *Batson v. Kentucky*?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

INTRODUCTION 1

STATEMENT OF THE CASE 2

Official Policy and Practice of Discrimination in Jury Composition in Dallas County, Texas. 3

State Court Proceedings 6

a. The State's Attempted Manipulation of the Jury Shuffle Process To Remove African Americans. 10

b. Disparate Questioning Designed To Develop For-Cause Challenges to African Americans. 13

c. Peremptory Challenges Employed by Prosecutors To Strike Ten of Eleven African Americans. 20

d. The State's Racially Disparate Application of Proffered Race-Neutral Rationales for Their Peremptory Strikes 21

Federal Court Proceedings 27

SUMMARY OF ARGUMENT 29

TABLE OF CONTENTS—Continued

Page

ARGUMENT 31

I. THE COURT BELOW APPLIED INCORRECT STANDARDS TO PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY AND TO THE MERITS OF HIS CLAIM. 31

A. The Court Erred in Basing Its COA Analysis on Whether Petitioner Had Established Ultimate Entitlement to Relief. 32

B. The Court Erred in Inserting Section 2254(e) into the Requirements of Section 2254(d). 35

II. A WRIT OF HABEAS CORPUS SHOULD ISSUE BECAUSE THE STATE COURTS' RESOLUTION OF PETITIONER'S *BATSON* CLAIM WAS "UNREASONABLE" WITHIN THE MEANING OF SECTION 2254(d). 38

A. *Batson* Claims Must Be Evaluated in Light of All Relevant Evidence. 38

B. The State Court's Resolution of Petitioner's *Batson* Claim Was Based on an Unreasonable Determination of the Facts in Light of the Evidence Presented. 41

C. The Court Should Direct Issuance of the Writ. 48

CONCLUSION 50

TABLE OF AUTHORITIES

CASES

Page(s)

Barefoot v. Estelle, 463 U.S. 880 (1983).....29, 32, 33, 34
Batson v. Kentucky, 476 U.S. 79 (1986).....*passim*
Berry v. State, 728 So. 2d 568 (Miss. 1999).....43, 44
C.E.J. v. State, 788 S.W.2d 849 (Tex. App.—Dallas 1990, writ denied).....6
Cassell v. Texas, 339 U.S. 282 (1950).....3
Chambers v. State, 784 S.W.2d 29 (Tex. Crim. App. 1989).....5, 19
Chappell v. State, 850 S.W.2d 508 (Tex. Crim. App. 1993).....12
Chivers v. State, 796 S.W.2d 529 (Tex. App.—Dallas 1990, pet. ref'd) 6
Coady v. Vaughn, 251 F.3d 480 (3d Cir. 2001).....35
Cooey v. Coyle, 2002 WL 552854 (6th Cir. Apr. 16, 2002).....35
Coulter v. Gilmore, 155 F.3d 912 (7th Cir. 1998)....40, 43, 45
Crouch v. State, 1993 WL 265424 (Tex. App.—Dallas July 12, 1993, pet. ref'd) 6
Ex Parte Haliburton, 755 S.W.2d 131 (Tex. Crim. App. 1988).....4
Fernandez v. Roe, 286 F.3d 1073 (9th Cir. 2002).....41, 47
Ford v. State, 2002 WL 811311 (Tex. Crim. App. May 1, 2002) 11
Hernandez v. New York, 500 U.S. 352 (1991) 30, 40, 43, 44
Hill v. State, 827 S.W.2d 860 (Tex. Crim. App.), *cert. denied*, 506 U.S. 905 (1992) 6
Hill v. Texas, 316 U.S. 400 (1942) 3, 42
Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991).....44
Huffman v. State, 450 S.W.2d 858 (Tex. Crim. App. 1970), *vacated in part*, 408 U.S. 936 (1972).....17
Jones v. Ryan, 987 F.2d 960 (3rd Cir. 1993).....41, 44, 47

TABLE OF AUTHORITIES—Continued

Page

Jordan v. Lefevre, 206 F.3d 196 (2d Cir. 2000) 40
Love v. Jones, 923 F.2d 816 (11th Cir. 1991).....45
Mahaffey v. Page, 162 F.3d 481 (7th Cir. 1999) 41
McClain v. Prunty, 217 F.3d 1209 (9th Cir. 2000)...40, 43, 44
McWee v. Weldon, 283 F.3d 179 (4th Cir. 2002) 35
Miller-El v. Johnson, 261 F.3d 445 (5th Cir. 2001), *cert. granted sub nom. Miller-El v. Cockrell*, 122 S. Ct. 981 (2002) 1
Miller-El v. State, 748 S.W.2d 459 (Tex. Crim. App. 1988).....1
Miller-El v. State, 790 S.W.2d 351 (Tex. App.—Dallas 1990).....5
People v. Morales, 719 N.E.2d 261 (Ill. 1999).....44
Purkett v. Elem, 514 U.S. 765 (1995).....41, 43, 48
Ramirez v. State, 862 S.W.2d 648 (Tex. App.—Dallas 1993).....6
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 40
Reich-Bacot v. State, 789 S.W.2d 401 (Tex. App.—Dallas 1990).....6
Riley v. Taylor, 277 F.3d 261 (3d Cir. 2001).....40
Sanna v. DiPaolo, 265 F.3d 1 (1st Cir. 2001) 37
Shayesteh v. City of South Salt Lake, 217 F.3d 1281 (10th Cir. 2000) 35
Slack v. McDaniel, 529 U.S. 473 (2000) 29, 32, 33, 34, 49
State v. Martinez, 42 P.3d 851, 858-59 (N.M. 2002) 41
State v. Washington, 375 So. 2d 1162 (La. 1979) 45
Swain v. Alabama, 380 U.S. 202 (1965).....*passim*
Torres v. Prunty, 223 F.3d 1103 (9th Cir. 2001).....37
United States v. Alvarado, 923 F.2d 253 (2d Cir. 1991).....41
United States v. Hill, 146 F.3d 337 (6th Cir. 1998).....40

TABLE OF AUTHORITIES—Continued

Page

United States v. Hughes, 864 F.2d 78 (8th Cir. 1988).....41
Valdez v. Cockrell, 274 F.3d 941 (5th Cir. 2001).....37
Vann v. State, 788 S.W.2d 899 (Tex. App.—Dallas 1990, pet. ref'd).....6
Williams v. Taylor, 529 U.S. 362 (2000).....30, 36
Williams v. Taylor, 529 U.S. 420 (2000).....33
Young v. State, 848 S.W.2d 203 (Tex. App.—Dallas 1992).....6

STATUTES

28 U.S.C. § 1254(1).....1
28 U.S.C. § 2253(c).....1, 29
28 U.S.C. § 2253(c)(1) 31
28 U.S.C. § 2253(c)(2) 28, 31, 33, 34
28 U.S.C. § 2254(d).....1, 28
28 U.S.C. § 2254(d)(1) 45
28 U.S.C. § 2254(d)(2) 27, 29, 30, 32, 36, 37
28 U.S.C. § 2254(e)(1) 1, 29, 30, 36, 37
Fed. R. App. P. 22(b)(1) 34
Tex. Crim. Proc. Code Ann. Art. 35.11 (Vernon 1989).....10
Act 1991, 72d Leg., Ch. 337, § 1 (eff. Sept. 1, 1999) 10

OPINIONS BELOW

The opinion of the court of appeals (JA 948-67) is reported at 261 F.3d 445. The opinion of the district court (JA 942-47) and the findings and recommendations of the magistrate judge that it adopts (JA 898-941) are unreported. The opinion of the Texas Court of Criminal Appeals abating petitioner's appeal and remanding it to the trial court (JA 832-36) is reported at 748 S.W.2d 459. The state trial court's findings of fact and conclusions of law after abatement of the appeal (JA 873-79) and the second opinion of the Texas Court of Criminal Appeals (JA 880-97) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2001. The petition for certiorari was filed on December 11, 2001, and granted on February 15, 2002. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment and 28 U.S.C. §§ 2253(c), 2254(d), and 2254(e)(1) are set forth at App., *infra*, 1a-2a.

INTRODUCTION

In 1986, when petitioner Miller-El—an African American—was tried, convicted, and sentenced to death, prosecutors in Dallas County, Texas, actively excluded African Americans from jury service. From 1951 until his long tenure ended in 1987, Dallas County District Attorney Henry Wade employed a policy of racial discrimination in jury selection that was properly labeled "appalling" by the federal magistrate judge in this case. A state judge who had served under Wade as an Assistant District Attorney reported that Wade had instructed him never to allow an African American to serve on a criminal jury. Two separate training manuals developed in Wade's regime and distributed to Assistant District Attorneys into the 1980s explicitly directed prosecutors to exclude all minorities, including African Americans, from petit juries. The prosecutors who selected

petitioner's jury were trained with those materials, and both were part of prosecution teams found by the Texas courts to have discriminated against African Americans in jury selection in two other cases tried within months of petitioner's trial. In petitioner's case, those prosecutors used peremptory challenges to strike ten of eleven qualified African Americans from the venire. The record demonstrates that they also engaged in racially motivated use of other jury selection tools, including a device called a jury "shuffle" and discriminatory questioning and for-cause challenges designed to eliminate African Americans from petitioner's jury.

This case, therefore, comes to this Court from a dark chapter of blatant and open racial discrimination in jury selection that, it can perhaps be said with confidence, has finally closed in this country. Shortly after petitioner's conviction, this Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986), which sought to make meaningful the Constitution's prohibition against intentional race discrimination in jury selection. As a result of *Batson*, there will presumably be no more Henry Wades, and no more government training materials advocating race discrimination in jury selection. But this case is extremely important nonetheless. If the blatant discrimination patent in this record is not condemned, then the subtler forms of unconstitutional race discrimination that sometimes, regrettably, occur in jury selection in our own era are much more likely to go undeterred. By confirming that the appalling discrimination practiced here violates the Constitution, the Court can make certain that the message of *Batson* remains clear.

STATEMENT OF THE CASE

This case involves the question whether the State's use of peremptory challenges to strike ten of the eleven African Americans qualified to serve on petitioner's jury was impermissibly based on race under this Court's ruling in *Batson*.

Official Policy and Practice of Discrimination in Jury Composition in Dallas County, Texas

1. At the time of trial in this case, Dallas County's extensive record of race discrimination in jury selection was well documented. In *Hill v. Texas*, 316 U.S. 400 (1942), this Court addressed practices that, prior to 1940, completely excluded African Americans from county grand juries. Noting that "chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period," the Court concluded that Dallas County jury commissioners had "discriminate[d] in the selection of jurors on racial grounds." *Id.* at 404. In *Cassell v. Texas*, 339 U.S. 282, 286 (1950), this Court concluded that "subsequent to the *Hill* case the Dallas County grand-jury commissioners . . . consistently limited Negroes selected for grand-jury service to not more than one on each grand jury." Thus, this Court held, Dallas County continued unconstitutionally to discriminate against African Americans with respect to grand jury service.

2. Henry Wade was first elected Dallas County District Attorney ("DA") in 1951, the year after *Cassell* was decided, and served until 1987, the year after petitioner was convicted. JA 699, 709, 817. According to a *Dallas Morning News* study published shortly before petitioner's trial (and before the state courts in this case), despite *Hill* and *Cassell*, the Dallas County DA's office engaged throughout Wade's tenure in a consistent practice of striking African Americans from petit juries in serious criminal cases, particularly where the defendant was African American. JA 709. The story quoted District Judge Jack Hampton, who had served on Wade's staff from 1958 to 1962, as saying that after he once allowed an African American woman to serve as a juror in a criminal case that eventually ended in mistrial, Wade reprimanded him: "If you ever put another nigger on a jury, you're fired." *Id.*

In the 1960s and 70s, Wade's office formally trained its prosecutors to use race in jury selection. A 1963 manual

instructed prosecutors to exercise peremptory strikes against African Americans and members of other minority groups: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated . . . . [T]hey will not do on juries.'" JA 710.

In 1969, Assistant DA John Sparling drafted another manual. Used in training sessions (JA 739-40, 795-96, 799-800, 804-06) and distributed to incoming prosecutors under the title "Jury Selection in a Criminal Case," JA 30, the manual advised that selection of jurors should "depend on . . . the age, color and sex of the Defendant," *id.*, and that prosecutors should exclude "any member of a minority group which may subject him to oppression," JA 32. According to the manual, "[m]inority races almost always empathize with the Defendant." JA 33. The Sparling manual served as a training tool into the 1980s, *see Ex Parte Haliburton*, 755 S.W.2d 131, 133 n.4 (Tex. Crim. App. 1988), and was therefore part of the training given to the prosecutors who handled jury selection in petitioner's case.[1]

3. Studies conducted by the *Dallas Morning News* in 1986 showed that discriminatory jury selection practices in Dallas County continued unabated in the 1980s. One study analyzed 100 randomly selected felony jury trials conducted in Dallas County between 1982 and 1984. JA 702. It demonstrated that prosecutors "routinely manipulate[d] the racial composition of juries through their use of peremptory challenges." JA 698. In the 100 trials studied (which involved approximately 4,434 prospective jurors), prosecutors eliminated 92% of the African Americans by peremptory strikes. JA 698-99. Consequently, although

[1] The prosecutors who conducted jury selection in petitioner's case were Assistant District Attorneys Paul Macaluso and James Nelson. Macaluso joined the Dallas County DA's office in the early 1970s. *See* JA 848. Nelson joined the office in 1980. *See* http://www.lockeliddell.com (website of Nelson's current firm, which lists his professional background). Thus, both joined the office while the Sparling manual was used to train new prosecutors.

African Americans comprised 18% of the Dallas County population in 1986, they accounted for fewer than 4% of jurors in felony trials. JA 698.

Another *Dallas Morning News* study revealed that, almost exclusively due to prosecutors' use of peremptory strikes, nine out of every ten African Americans qualified to serve on capital murder juries between 1980 and 1986 were never permitted to do so. JA 815. In the fifteen capital trials studied, prosecutors were responsible for striking 98% of the African Americans eliminated from jury service by peremptory strikes. *Id.* When combined with the prosecution's use of for-cause challenges, this practice meant that only one in twelve African American veniremembers were selected as jurors in Dallas County capital cases between 1980 and 1986, compared to a rate of one in three for whites and one in four for Latinos. JA 816.

The prosecutors who handled jury selection in petitioner's case—Paul Macaluso and James Nelson—engaged in discriminatory jury selection tactics in other cases in the same time period, leading to the reversal of two convictions on *Batson* grounds. In a case tried shortly before petitioner's, Macaluso was found to have engaged in disparate questioning on the basis of race, to have used peremptory strikes improperly to exclude African Americans, and to have offered false, pretextual explanations for his actions in selecting the jury in that case. *See Chambers v. State*, 784 S.W.2d 29, 31-32 (Tex. Crim. App. 1989) (en banc). Nelson was lead prosecutor in the trial of petitioner's wife just three months after petitioner's trial, in which the prosecution's purported race-neutral reason for one of its peremptory strikes was found to be a pretext for purposeful racial discrimination. *See Miller-El v. State*, 790 S.W.2d 351, 357 (Tex. App.—Dallas 1990).[2]

[2] Following this Court's decision in *Batson*, several other Dallas County criminal convictions were overturned on the grounds that prosecutors had used peremptory challenges improperly to remove

State Court Proceedings

1. Petitioner's jury was selected in February and March, 1986, in the context of this documented past and continuing practice of racial discrimination. Twenty of the 108 veniremembers individually reviewed by the prosecution and defense were African Americans. Nine of those African Americans were removed either by agreement of the parties or by the court for cause. Of the eleven qualified African American veniremembers that remained, prosecutors Macaluso and Nelson used ten of their fourteen peremptory strikes to remove all but one.[3] The prosecution thus used peremptories to strike 91% of the African Americans qualified to serve on petitioner's jury. In contrast, the prosecutors peremptorily removed only four—or 13%—of thirty-one qualified non-African Americans.[4]

Petitioner responded by moving, based on *Swain v. Alabama*, 380 U.S. 202 (1965), to strike the jury due to purposeful racial discrimination by the prosecution. At the hearing on that motion, petitioner introduced evidence that the racial disparity in the prosecution's use of peremptory challenges here was consistent with a longstanding pattern and practice of discrimination by the Dallas County DA's

African American veniremembers. *See, e.g., Young v. State*, 848 S.W.2d 203 (Tex. App.—Dallas 1992); *Ramirez v. State*, 862 S.W.2d 648 (Tex. App.—Dallas 1993); *Chivers v. State*, 796 S.W.2d 529 (Tex. App—Dallas 1990, pet. ref'd); *Hill v. State*, 827 S.W.2d 860 (Tex. Crim. App.) (en banc), *cert. denied*, 506 U.S. 905 (1992); *C.E.J. v. State*, 788 S.W.2d 849 (Tex. App.—Dallas 1990, writ denied); *Vann v. State*, 788 S.W.2d 899 (Tex. App.—Dallas 1990, pet. ref'd); *Reich-Bacot v. State*, 789 S.W.2d 401 (Tex. App.—Dallas 1990); *Crouch v. State*, 1993 WL 265424 (Tex. App.—Dallas, July 12, 1993, pet. ref'd).

[3] Each side was permitted to exercise up to fifteen peremptory strikes. The State's strikes of African Americans are found at JA 101 (Roderick Bozeman), 131 (Billy Jean Fields), 154 (Joe Warren), 186 (Edwin Rand), 210 (Carrol Boggess), 248 (Wayman Kennedy), 566 (Linda Baker), 634 (Janice Mackey), 643 (Paul Bailey), 675 (Anna Keaton).

[4] JA 359 (Margaret Gibson), 382 (James Holtz), 396 (Penny Crowson), 619 (Charlotte Whaley).

office. That evidence included the initial *Morning News* study discussed above, JA 753, and the discriminatory training materials used by the county DA's office, JA 740-41. Petitioner also presented several witnesses, including three state judges and a public defender, who testified to the dearth of empanelled African American jurors in Dallas County cases and the pervasiveness of racially discriminatory jury selection practices on the part of county prosecutors.[5]

Consistent with the *Morning News* story described above, Judge Jack Hampton testified that either Henry Wade or his first assistant told him that he would be fired if he put another African American on a jury. Judge Hampton also testified that he could not recall allowing an African American to serve on a jury after receiving that instruction and that he would not have done so unless he had run out of peremptory strikes. JA 759-60, 766-67. Judge Hampton explained that prosecutors "didn't talk much about" the policy of excluding African Americans from jury service, but "from observation that is what happened." JA 760.

Judges Harold Entz and Larry Baraka testified about exclusionary techniques employed by prosecutors in their courtrooms. Judge Entz testified that one prosecutor *admitted* that he had asked for a "jury shuffle"—a procedure sanctioned by state law and designed to rearrange the order in which potential jurors appear for voir dire, *see infra* at 10-11—"because a predominant number of the first six, eight, or ten jurors were blacks." JA 788. Judge Baraka testified about prosecutors' widespread use of racially motivated peremptory strikes, reporting that, after one 1985 case, he had barred a prosecutor who had used all of his peremptory challenges to strike African Americans from conducting similar jury selections in his courtroom. JA 769. Based on his observations in that and other cases, Judge Baraka

[5] Other witnesses, including current members of the office, either denied that the office discriminated or were less definitive in describing its racial biases.

concluded that African Americans had been systematically excluded from juries in Dallas County. JA 770-71.

Ralph Tait, Chief Public Defender for Dallas County, discussed local prosecutors' conduct from the perspective of the defense bar. He explained that prosecutors' discriminatory tactics were so predictable that defense counsel rarely planned to use any of their own peremptory strikes to remove African American veniremembers they regarded as undesirable. JA 777. Tait testified that defense attorneys confidently assumed that the State would remove even pro-prosecution African Americans, and thus defense counsel would not reserve strikes to remove such jurors as jury selection progressed. *Id.*

The trial court denied petitioner's motion to strike the jury, finding "no evidence . . . that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases." JA 813.

2. Following his conviction and death sentence, petitioner pursued his claim of race discrimination in the State's peremptory strikes to the Texas Court of Criminal Appeals. Soon after petitioner's appeal was docketed, this Court decided *Batson*, which "reexamin[ed] . . . the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." 476 U.S. at 82. *Batson* established a three-part analysis pursuant to which the courts must determine whether the prosecution engaged in "purposeful discrimination." *Id.* at 97-99.

Two years later, the Court of Criminal Appeals abated petitioner's appeal and remanded his case to the trial court for a hearing under *Batson*. The court held that the circumstances "sufficiently raised the issue of the State's use of peremptory strikes at trial to invoke *Batson*." JA 833. The court also concluded that petitioner had "established an

inference [of discrimination] as required by . . . *Batson*," noting that "the prosecutor exercised ten of fourteen peremptory challenges to exclude members of [petitioner's] race," and that, "in using such a skewed number of strikes on the black veniremen, ten of the eleven prospective black jurors were peremptorily struck." JA 835. The court remanded the case for a determination "whether there was racial motivation in the prosecutor's actions." *Id.*

The judge who had presided over petitioner's trial then conducted a *Batson* hearing and, despite the Court of Criminal Appeals' conclusion that petitioner had already made out a prima facie case, required petitioner to re-submit evidence that "discrimination was invoked in the State's striking of certain jurors." JA 838-39. Accordingly, petitioner re-introduced evidence showing that the DA's office had engaged in a pattern and practice of purposeful racial discrimination at the jury selection phase of numerous past and contemporaneous cases. JA 839-41.[6] Also before the court was record evidence demonstrating that the prosecution had used a number of tactics, including peremptory strikes, to exclude African Americans from his jury. JA 839-40.[7] The prosecution asked that the court incorporate into the record the explanations it had given during voir dire for its peremptory strikes of certain African American jurors. JA 851-52. Prosecutor Macaluso also articulated reasons for two peremptories that had not been discussed during voir dire. *See id.*

3. The record showed that, consistent with the pattern and practice evidence from other cases, prosecutors Macaluso and Nelson employed a number of strategies to

---

[6] The prosecution objected to the re-introduction of this evidence. JA 841-42. The court admitted the evidence but suggested that it might ultimately accord it little or no weight. JA 843-44.

[7] The trial court indicated that it would consider "all of the voir dire including the composition of the jury, the agreements to excuse," and its own recollection and notes. JA 847; *see also* JA 870-71.

prevent African Americans from serving on petitioner's jury. They attempted to manipulate the "jury shuffle" process in a manner evidencing race discrimination, and consistently questioned African American jurors differently than white jurors in an apparent effort to establish a basis for a for-cause removal. The record also showed that, as in other cases, the "racially neutral" explanations offered by Macaluso and Nelson for their decisions to strike African American jurors applied equally to white jurors the prosecutors did not strike.

a. *The State's Attempted Manipulation of the Jury Shuffle Process To Remove African Americans.* Texas law affords attorneys in criminal cases the opportunity to change the order in which potential jurors are presented for voir dire, and therefore for jury selection. At the time of petitioner's trial, the statutory provision addressing this procedure, commonly called a "jury shuffle," provided:

> The trial judge, on the demand of the defendant . . . or the State's counsel, shall cause the names of all the members of the general panel drawn or assigned as jurors in such case to be placed in a receptacle and well[-]shaken, and the clerk shall draw therefrom the names of a sufficient number of jurors from which a jury may be selected to try such case, and such names shall be written, in the order drawn, on the jury list from which the jury is to be selected to try such case.

Tex. Crim. Proc. Code Ann. Art. 35.11 (Vernon 1989).[8] Jury shuffles occur prior to the start of any voir dire, when the only available information about potential jurors comes from juror information cards and what attorneys can glean from physical appearances.[9] As a result, jury shuffles function as a

---

8 Article 35.11 has since been amended. *See* Acts 1991, 72d Leg., Ch. 337, § 1, eff. Sept. 1, 1999.

9 Juror information cards typically indicate a potential juror's name, place of birth, marital status, number of children, employer and work history, place and duration of residence, spouse, occupation, address and telephone number, and prior jury service, among other things. *See* JL 54-108. In addition, prosecutors Macaluso and Nelson annotated the cards by hand with codes that indicated the race of each juror. *Id.* The prosecutors were thus able to track the race of the members of each week's venire pool, and to plan their jury selection strategies accordingly.

device for moving forward veniremembers who are "visually preferred" to increase the chances of their selection, and for "placing visually non-preferred venire members later" in the seating to minimize the chance that they will ultimately be empanelled as jurors. *Ford v. State*, 2002 WL 811311, at *5 (Tex. Crim. App. May 1, 2002) (Holcomb, J., dissenting). As Judge Entz testified during the *Swain* hearing in this case, the Dallas County DA's office used jury shuffles to affect the racial composition of juries. JA 788.

The prosecutors plainly attempted to use the jury shuffle procedure in this case to reduce the number of African Americans who would be subjected to voir dire. Jury selection took place over the course of approximately five weeks. At the beginning of each week, the court called a panel consisting of forty to fifty members, each of whom was assigned a number. *See, e.g.*, JA 46-47. Unless chosen for the jury, the veniremembers' service obligations did not extend past the end of the week. *Id.* Voir dire occurred in numerical order, in groups of six or fewer per day. *See, e.g.*, *Id.* Consequently, a significant proportion of each venire panel would not be interviewed by the end of the week, and the trial judge routinely dismissed the last fifteen or more members before they even completed a jury questionnaire. *See, e.g.*, JA 50-51. Prospective jurors toward the beginning of a list thus were far more likely to be empanelled than those toward the end.

Both the State and the defense requested shuffles in the first week of voir dire, but the record does not reflect the racial composition or order of presentation of the venire panel. *See, e.g.*, JA 45-46.[10] In the second week, the State

---

10 At the time of petitioner's trial, Texas law permitted the State and the defense to request a jury shuffle of every panel presented for voir dire.

again requested a jury shuffle, and refused to provide a reason for doing so. Defense counsel then described the composition of the panel: "I would like the record to indicate that within the first ten jurors . . . four are black. Within the second set . . . three are black and within the third set . . . two are black and [in] the fourth set . . . one is black." JA 48. The trial court instructed that the shuffle be performed "as quickly as possible." *Id.* After the shuffle, the first ten members of the venire included two African Americans; the second ten included one African American; the third ten included three African Americans; and the fourth and final ten included four African Americans. JL 62-71.

When initially seated, the third week's venire panel included African Americans in seats 1, 2, 3, 4, 8, and 15. JA 61-62. The State requested a shuffle. After the State's shuffle, the position of those same African American jurors had changed to 19, 26, 36, 37, 38, and 39. *Id.* The defense then exercised its jury shuffle right, after which the African American jurors again appeared near the beginning of the panel in positions 1, 2, 3, 4, 7, and 14. JA 62. At this point, the prosecution informed the judge that it objected to the defense's shuffle. JA 56-65. Although they had not raised the issue before the shuffle was conducted, prosecutors Macaluso and Nelson demanded a re-shuffle ostensibly because the defense counsel's shuffle had been performed outside the courtroom in the central jury room. JA 57. Defense counsel objected, pointing out that the State's own shuffles had been conducted in precisely the same manner and at precisely the same location, and suggested that the State's protest stemmed from a concern about the presence of African Americans in the first part of the venire. JA 60-62. The trial court denied the State's request. The jury was filled

---

Under current law, only one shuffle per panel may be conducted. *See Chappell v. State*, 850 S.W.2d 508, 510-11 (Tex. Crim. App. 1993).

during the fifth week of voir dire; the final juror seated was the 108th veniremember reviewed.[11]

b. *Disparate Questioning Designed To Develop For-Cause Challenges to African Americans.* Although a total of 108 veniremembers (including twenty African Americans) were reviewed by the parties, not all were subjected to voir dire. Rather, the court excused three members of the venire for cause prior to questioning, and the parties jointly agreed to remove thirty-nine others, including five African Americans.[12] Thus, a total of sixty-six veniremembers were subject to full voir dire, including forty-nine whites, fifteen African Americans, one Asian American, and one Latino.

Prosecutors Macaluso and Nelson systematically questioned African American veniremembers differently than white veniremembers in an obvious effort to establish a basis to remove African Americans for cause. Indeed, although only three African Americans were ultimately removed for cause, the prosecution moved to strike for cause nine—or 60%—of the fifteen who were questioned.[13]

The prosecutors' disparate examination of African American veniremembers focused on two for-cause areas. The first concerned potential jurors' feelings about the death penalty. At the outset of each voir dire, the prosecution asked veniremembers of all races whether in their view the death penalty served a societal purpose, and how they felt about serving in a death penalty case. The script for these questions, however, differed considerably according to the

---

11 A total of thirteen jurors were selected. One of those selected, white juror Mary Sumrow, was subsequently excused for medical reasons.

12 A few of these thirty-nine veniremembers were subjected to brief preliminary questioning prior to being removed by joint agreement. *See, e.g.*, JA 373 (Hilbert Gitchoway).

13 *See* JA 173 (Rand), 375 (Virginia Smith), 475 (Jeannette Butler), 476 (Louise Carter), 230 (Kennedy), 634 (Janice Mackey), 642 (Bailey); App. 4a (Jerry Mosley), App. 7a-8a (Keaton). The court granted the State's motions as to Smith, Butler, and Carter. Mosley was subsequently removed by agreement. *See* App.5a-6a.

race of the veniremember. With eight of the fifteen African Americans, the prosecution began with a graphic script describing the physical mechanics of an execution—presumably to prompt more negative feelings about service in a death case.[14] The prosecution opened with this formulation even where the particular African American veniremember had already, in the written questionnaire, expressed support for the death penalty.[15] For the vast majority of white veniremembers, in contrast, the prosecution used a formulation that explored their feelings about serving on a capital jury in only the vaguest of terms.[16] The prosecution employed the graphic formulation at the outset of questioning with only three of the forty-nine white veniremembers subjected to voir dire, and two of those had already expressed clear opposition to the death penalty in their written questionnaires.[17]

---

[14] *See* JA 473-75 (Butler), 480-81 (Boggess), 214-16 (Kennedy), 560-62 (Baker), 251-53 (Troy Woods), 631-33 (Mackey), 640-42 (Bailey), 672-75 (Keaton).

[15] *See* JA 560-62 (Baker), 480-81 (Boggess), 214-16 (Kennedy).

[16] *See* JA 273-74 (Cynthia Young), 275-77 (Dennis Merrell), 278-80 (Don Hambrick), 284-85 (Emily Williams), 287-88 (Darol Weigant), 353-55 (Gibson), 360-62 (Carol Taylor), 365-66 (John Nelson), 367-68 (Harold Sohner), 369-70 (Billy Wagoner), 376-77 (Holtz), 384-85 (Sandra Jenkins), 389-91 (Colleen Moses), 394-95 (Crowson), 397-98 (Gwendolyn Smale), 402-03 (Ronnie Long), 406-09 (Linda Berk), 432-33 (Noad Vickery), 437-39 (Gene Hinson), 502-03 (Sheila White), 504-06 (Joan Weiner), 512-13 (Ronald Salsini), 517-19 (Marie Mazza), 523-24 (Chatta Nix), 530-31 (Mary Jane Witt), 535-36 (Leta Girard), 543-45 (Jean Williams), 554-56 (Charles Smith), 567-69 (Debra McDowell), 572-74 (Joyce Willard), 574-76 (Virginia Webb), 581-82 (Kevin Duke), 588-90 (Louis Wolters), 594-95 (Cheryl Davis), 599-601 (Gary Spence), 609-10 (Mildred Pincus), 611-12 (Carol King), 617-18 (Whaley), 620-21 (Catherine Barnard), 626-27 (Susan Page), 635-36 (Brenda Walsh), 644-45 (Russell Jones), 685-86 (Max O'Dell), 692-94 (Sandra Hearn).

[17] *See* JA 410-11 (Dominick Desinise), 537-40 (Clara Evans), 549-50 (Vivian Sztybel). Desinise and Evans had indicated their strong opposition to the death penalty in their juror questionnaires. Apart from these white jurors, the prosecutors employed their graphic description of the physical realities of an execution with white jurors only *after* they had already expressed some hesitation about the death penalty.

For example, prosecutor Macaluso questioned African American juror Carrol Boggess as follows:

> MR. MACALUSO: [W]e intend to provide this jury . . . with the type and the quality of evidence that would convince them . . . that [the sentencing] questions . . . should be answered yes. All yes answers, as you know, would result in the law requiring the Judge to sentence Thomas Joe Miller-El to be taken some day down to Huntsville, Texas and at an appointed time . . . *he be taken to the death house to have a needle placed into his arm and thereafter have a lethal substance injected into his body to cause his death as the law requires under those situations. I'm not trying to make this sound real gory or gruesome . . . but it wouldn't be fair to you to lull you into some sense that this is going to be some kind of a—any other type of case when we know it's not and what the stakes are ultimately*. . . . Do you see what I'm getting at?
>
> MS. BOGGESS: Yes.
>
> MR. MACALUSO: It's one thing to sit around and talk about what you might do in a situation, what you would like to do or what ought to be done . . . . I know that it is quite a different situation frequently when you're actually called upon to do something yourself. . . . Do you see what I'm getting at?
>
> MS. BOGGESS: Yes.
>
> MR. MACALUSO: [C]ould you share with us, Ms. Boggess . . . what your feeling are really about the death penalty and whether or not you can actually serve on this type of case?

JA 191-92 (emphasis added).[18] The prosecutors' standard approach to white jurors, however, omitted all mention of the mechanics of execution.[19]

---

[18] The prosecution used the same basic script, for example, when questioning Wayman Kennedy, also African American (JA 214-15 (emphasis added)):

> MR. NELSON: [I]f those three [sentencing] questions are answered yes, at some point, Thomas Joe Miller-El will be taken to Huntsville, Texas. *He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death . . . as the result of the verdict in this case if those three questions are answered yes.*
>
> * * * *
>
> MR. NELSON: Would you just tell us in your own words, if you would, how you feel about the death penalty and whether it serves a purpose in our society today?

[19] White jurors Joan Weiner and Marie Mazza, for example, were questioned with the standard formulation for white jurors at almost the same time as Boggess and Kennedy. Macaluso questioned Weiner as follows (JA 505-06):

> MR. MACALUSO: [W]e are actively seeking the death penalty in this case for Thomas Joe Miller-El . . . . As you know, three yes answers [to the sentencing questions] equal a mandatory, automatic sentence of death for Thomas Joe Miller-El or anyone else so charged . . . Would you share with us . . . your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence?

He questioned Mazza as follows (JA 517-18):

> MR. MACALUSO: [W]e're actively seeking the death penalty in this case for Thomas Joe Miller-El . . . [W]e intend to be able to provide this jury with the type and quality of evidence . . . that would convince them that these [sentencing] questions . . . should be answered yes. As you know, the result of three yes answers or all yes answers is a mandatory sentence of death. Basically that's what we're seeking based on the evidence that we intend to offer during the course of this trial . . . . Let me just ask you, Marie, to share with us in your own words how you feel about the death penalty, you know, capital punishment generally speaking and then whether or not you feel you could actually serve on this type of a case or are suited to serve on this type of a case?

The prosecution also questioned whites and African Americans differently with respect to their willingness to impose the minimum penalty for murder—again with the obvious design to establish a basis to remove African American veniremembers. (Unwillingness to impose the minimum penalty warrants removal for cause, *see Huffman v. State*, 450 S.W.2d 858, 861 (Tex. Crim. App. 1970), *vacated in part*, 408 U.S. 936 (1972).) With forty-seven of forty-nine white jurors, the State identified the minimum statutory penalty early in its questioning, before it asked what they believed an appropriate minimum would be.[20] In contrast, if the State ever articulated the minimum sentence of five years when questioning African Americans, it did so only after attempting to induce them to commit themselves to a *higher* minimum sentence. The State used this manipulative style—to which defense counsel regularly objected[21]—with all but one of the African American jurors.[22]

The questioning of veniremember Kennedy is illustrative. The prosecution opened by explaining that, were the jury to find petitioner not guilty of felony murder, then

---

[20] *See, e.g.*, JA 280-83 (Don Hambrick), 285-87 (Williams), 289-91 (Weigant), 362-64 (Taylor), 370-73 (Waggoner), 385-87 (Jenkins), 391-92 (Moses), 398-401 (Smale), 403-05 (Long), 433-35 (Vickery), 506-10 (Weiner), 514-16 (Salsini), 519-22 (Mazza), 524-27 (Nix), 532-34 (Mary Jane Witt), 545-48 (Williams), 550-53 (Szytbel), 556-59 (Smith), 569-72 (McDowell), 576-80 (Webb), 582-86 (Duke), 590-92 (Wolters), 596-98 (Davis), 602-08 (Spence), 612-16 (King), 621-25 (Barnard), 628-31 (Page), 636-39 (Walsh), 645-50 (Jones), 686-91 (O'Dell), 694-97 (Hearn). The two exceptions had already expressed opposition to the death penalty. *See* JA 355-59 (Gibson), 378-82 (Holtz).

[21] *See, e.g.*, JA 311-12, 451-53, 494-95, 227, 563.

[22] *See, e.g.*, JA 93-94 (Bozeman), 119-24 (Fields), 145-50 (Warren), 161-69 (Rand), 202-08 (Boggess), 225-30 (Kennedy), 562-69 (Baker).

the death penalty would not be available. In that circumstance, the prosecution continued, the question would be whether petitioner was guilty of simple murder. JA 225. The prosecution then explained at great length that murder is different from, and more serious than, killing in self-defense, manslaughter, and killing when mentally incompetent. JA 225-26. In particular, the prosecution stressed that the issue would be whether petitioner was guilty of a "knowing and intentional" killing. JA 226. Having thus stressed the seriousness of murder as contrasted with lesser forms of homicide, the prosecution then asked an open-ended question about sentencing (JA 226-27):

> MR. NELSON: Now the maximum sentence for [murder] ... is life under the law. Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of [intentional] murder the way I've set it out for you?
>
> MR. KENNEDY: Well, to me that's almost like it's premeditated. But you said they don't have a premeditated statute here in Texas.
>
> * * * *
>
> MR. NELSON: Again, we're not talking about self-defense or accident or insanity or killing in the heat of passion or anything like that. We're talking about the knowing—
>
> MR. KENNEDY: I know you said the minimum. The minimum amount that I would say would be at least 20 years.
>
> MR. NELSON: For the taking of another human life?
>
> MR. KENNEDY: Yes.

Again, the State employed a starkly different approach with white veniremembers. Rather than asking open-ended questions about the minimum sentence the veniremember thought was appropriate, the prosecution almost invariably began by identifying the precise statutory minimum, and then seeking confirmation that the juror would support that

penalty if warranted. Early in the questioning of white juror Weiner, for example, the following exchange ensued:

> MR. MACALUSO: All the law says is this, and I think you can do this: All the law expects of a juror in a murder case, number one, is to keep an open mind, follow the law and just tell us you will wait and listen to all of the evidence .... You're not going to jump to any judgment or anything like that ....
>
> MS. WEINER: No.
>
> * * * *
>
> MR. MACALUSO: .... In other words—you see, the range of penalty for murder is from five years in the Texas Department of Corrections up to 99 years or life and you can even add on an option of a $10,000.00 fine. I gather from what you've said you are the type of person who has an open mind?
>
> MS. WEINER: Yes.
>
> * * * *
>
> MR. MACALUSO: If you hear a case, to your way of thinking calls for and warrants and justifies five years, you'll give it?
>
> MS. WEINER: Yes.

JA 508-09. By informing white jurors at the outset about the statutory minimum, the prosecution obviously minimized the likelihood that they would identify a sentence above that minimum as the lowest they could possibly impose.[23]

The State tried to capitalize on its disparate questioning by asking that nine of the fifteen African Americans

---

[23] It is notable that, in *Chambers*, the Texas Court of Criminal Appeals found that Macaluso had—shortly before his questioning here—engaged in the same disparate questioning concerning minimum punishment. *See* 784 S.W.2d at 31. Macaluso's professed desire to protect the defendant from over-zealous pro-prosecution jurors who could not accept the statutory minimum penalty did not extend to white panelists at all. *Id.* As noted *supra* at 5, the court held that Macaluso's actions during jury selection in that case violated *Batson*. *Id.* at 32.

subjected to voir dire be struck for cause. Three African Americans were ultimately struck for cause, and one was removed by joint agreement of the parties after voir dire. *See supra* note 13.

c. *Peremptory Challenges Employed by Prosecutors To Strike Ten of Eleven African Americans.* As a result of the foregoing, eleven African Americans were qualified to serve on the jury. The prosecutors, however, used ten of the fourteen peremptory challenges they exercised to strike all but one—or 91%—of them. In contrast, the prosecutors used peremptory strikes on just four—or 13%—of the thirty-one non-African Americans similarly qualified for service.

The prosecution denied that it had used its peremptory strikes to remove African Americans, *see, e.g.*, JA 844-45, and pointed out that one African American veniremember, Troy Woods, was empanelled. The record suggests, however, that Woods' eventual selection was a function of numbers. At the time Woods was interviewed, only seven of the twelve seats on the jury had been filled, and the State had only four peremptory strikes remaining. The eight veniremembers following Woods included three African Americans. JL 93-95. The State could not be sure of removing them—and any strong pro-defense or anti-death-penalty white jurors—from the jury without saving a sufficient number of peremptories. Indeed, the State subsequently used three of its four peremptories to strike the remaining African Americans. JA 634, 643, 675.

In these circumstances, the State presumably accepted Woods because he was stridently supportive of the death penalty. JA 255-56; JL 93. When asked whether he could impose a death sentence, Woods replied: "[Lethal injection is] too quick. They don't feel the pain . . . [W]hat I call punishment is back to the old Indian days . . . . Pour some honey on them and stake them out over an antbed . . . . That's what I call punishment." JA 255. Even with this expression of strong pro-death-penalty sentiment, the prosecutors balked

before accepting Woods, asking the judge to allow them to deliberate for "a few minutes." JA 271-72.

d. *The State's Racially Disparate Application of Proffered Race-Neutral Rationales for Their Peremptory Strikes.* In response to defense counsel's objections, the prosecution proffered race-neutral rationales for its peremptory strikes. For six of the ten African Americans who were struck, those justifications consisted of one or more of three professed concerns: hesitancy or ambivalence about the death penalty; hesitancy about executing defendants who are capable of being rehabilitated; and a family history of criminality or trouble with the law. Yet each of these justifications applied equally to white jurors whom the prosecution did not seek to exclude from jury service.

i. *Ambivalence about the death penalty.* The State permitted white veniremembers who expressed hesitancy about the death penalty to be seated on the jury. For example, white juror Sandra Hearn explained that she did not think "anyone should be sentenced to a death penalty on [a] first offense." JA 694. Similarly, white juror Marie Mazza expressed considerable hesitancy about her ability to impose the death penalty: "It's difficult, I know—and I've had two days to think about it. Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult." JA 519. Hearn and Mazza both served on the jury.[24]

ii. *Hesitation based upon potential rehabilitation.* White juror Hearn stated that her support for the death

---

[24] White veniremember Robert Salsini expressed only qualified support for the death penalty: "I think I could make the decision, you know, come up with it, but I think it would be more of I would be forced into that position. I wouldn't be happy with it, but I could do it. I don't think I would be pleased with it. Even if there was no doubt or anything, I think I might have a problem with it in the future." JA 514. After the prosecution offered no objection, the defense struck juror Salsini.

penalty depended on whether the defendant could be rehabilitated. JA 694 ("I believe in the death penalty if a criminal cannot be rehabilitated and continues to commit the same type of crime. I do not think anyone should be sentenced to a death penalty on [a] first offense."). White juror Kevin Duke also expressed strong pro-defendant views about rehabilitation. When asked his opinion about a law that would permit a defendant convicted of murder to be eligible for parole in just two years, Duke responded: "I think it's a good one. If they've changed within those two years and they can be a responsible human being and live in society, I see nothing wrong with it. . . . I believe in forgiving." JA 587. Jurors Hearn and Duke both served on the jury.

iii. *Family history of criminality.* The State accepted numerous white jurors whose family members had substantial criminal backgrounds. Noad Vickery testified that his sister had been incarcerated in the state penitentiary. JA 435-36. Cheryl Davis stated that her husband had been convicted of theft. JA 598-99. Chatta Nix revealed not only that her brother was then on trial as part of a construction scandal, but also that she herself had been "charged with a conspiracy case" related to that scandal. JA 528. Joan Weiner indicated that her son had been arrested for shoplifting. JA 511. Despite these histories, the State did not strike Vickery, Davis, Nix or Weiner.[25]

The State's acceptance of these white jurors severely compromises its proffered race-neutral rationales for striking the following six African American jurors:

Edwin Rand. The State asserted that it struck veniremember Rand because of his ambivalence about the death penalty. JA 186-87. But Rand expressed no greater hesitancy than white jurors Hearn and Mazza. Rand clearly supported the death penalty on his juror questionnaire,

---

25 Weiner served on petitioner's jury. The defense used peremptory strikes to remove the other three, after the State declined to strike them.

writing that he supported the death penalty "depending on [the] crime," and that he thought it was "possibly" appropriate for "all murder." JL 36. During voir dire, he confirmed that he thought the death penalty "could be enforced depending upon the crime itself, the circumstances of why someone was killed or could it have been avoided, that type of situation." JA 158; *see also* JA 159 (explaining view that death penalty should be considered for murder committed in the course of a robbery "because of the murder knowingly. It wasn't a case of, say, self-defense or an accidental type thing."). And although Rand expressed some initial uncertainty about his ability to impose the death penalty, he subsequently confirmed that he could serve on a capital jury. JA 162-64. Indeed, the State itself confirmed Rand's readiness to serve on the jury in this case, noting the following on his juror questionnaire: "Could be enforced depending upon circums . . . Murd./Robb.—Type of offense think proper for DP . . . 'Yes'—I can serve." JL 36.

Wayman Kennedy. As with Rand, the State asserted that it struck Kennedy because of hesitancy about the death penalty. JA 248-49. But, in contrast to white jurors Hearn and Mazza, Kennedy did not express hesitancy about imposing the death penalty in murder-robbery cases like this one. Rather, Kennedy explained that, "if the circumstances around the situation were presented the way that I feel would warrant the death sentence, I would say yeah, but it also depends on the circumstances." JA 222-23. When asked whether he could give "a yes answer to each of those three [sentencing] questions knowing it would result in the death sentence even though [his] personal feelings were that the man should get a life sentence," Kennedy said that "[i]t would depend on the evidence," JA 223, and that he could answer all the questions affirmatively if he were satisfied that the prosecution had proved its case, JA 224.

Roderick Bozeman. In striking Bozeman, the State maintained that it was concerned about his hesitation about the death penalty and his views on rehabilitation. JA 102-03.

The record, however, shows that Bozeman supported the death penalty. In his juror questionnaire, he indicated that he supported imposing the death penalty where "the nature of the crime and the circumstances leading up to the crime" warranted it. JL 12. After the prosecution listed the crimes punishable by death in Texas, including murder during a robbery, Bozeman agreed that those were offenses that should make a defendant eligible for the death penalty. JA 83-84. Bozeman was at least as strong a supporter of capital punishment as were jurors Hearn and Mazza.

Nor did Bozeman limit the universe of cases in which the death penalty would be appropriate to ones in which rehabilitation was impossible. Like Hearn, Bozeman stated that he favored the death penalty in cases where there was no way to rehabilitate a person. JA 79. And he confirmed that his feelings about rehabilitation would not in any way conflict with his ability to answer the specific questions put to the jury at sentencing. JA 89.

Billy Jean Fields. The prosecutors claimed that they struck Fields because of his views on rehabilitation, concern that Fields' Roman Catholic faith would interfere with his application of the death penalty, and concern that Fields' brother had a criminal record. JA 131-33. But Fields indicated on his questionnaire that he believed in the death penalty and wrote that "[i]f you commit the crime pay the [penalty]." JL 20; *see also* JA 108-09 (indicating Fields saw death penalty as a deterrent to crime). Fields did say he believed that everyone could be rehabilitated. But in contrast to white juror Hearn, he made clear that he supported the death penalty nevertheless. JA 118-19. Indeed, the State acknowledged the strength of Fields' views by noting on his questionnaire that he had "no reservations" against the death penalty. JL 20.

The State's professed concern that Fields would not be able to impose the death penalty because of the dictates of his Catholic faith is also refuted by the record. Fields testified that he did not agree with the Church's opposition to the

death penalty, and confirmed that he had no philosophical or religious reservations about it. JA 107-08. Moreover, the State accepted at least three non-African American Catholics for service on petitioner's jury. Mary Sumrow, a white Catholic, was initially seated as the first juror in the case but later had to be excused due to medical hardship. *See* JA 323. Filemon Zablan, an Asian Catholic, was seated as the tenth juror. JA 671-72. Max O'Dell, a white Catholic, was accepted by the State but struck by the defense. JA 691.

Finally, the State failed even to raise the issue of Fields' brother's criminal record during its examination, and, as noted, it did not exercise peremptory strikes against any of the four white jurors with similar family circumstances.

Joe Warren. The State claimed it struck veniremember Joe Warren based on hesitancy about the death penalty and family members' negative experiences with the law. JA 856-59. But as with the other African Americans at issue here, the record shows that Warren expressed clear support for the death penalty. In his juror questionnaire, Warren wrote that he believed in the death penalty "[i]n some cases." JL 28; *see also* JA 137 (testifying to view that death penalty might not be appropriate in cases of self-defense). Warren did state that he sometimes felt that if the death penalty is imposed, the condemned person would not really suffer. JA 140. But the State accepted white juror Sandra Jenkins, who expressed similar views. JA 384 (explaining that "life imprisonment with no parole" was "a harsher treatment" than the death penalty). Overall, Warren's support for the death penalty was at least as strong as that of Hearn and Mazza.

Despite the prosecution's subsequently professed concern about Warren's brother's and son's experiences with the law, it never raised them during voir dire. Indeed, the issue arose in voir dire only during questioning by defense counsel, when Warren confirmed that his son's difficulties at school would have no impact on his deliberations in the case. JA 153. Moreover, Warren is not distinguished on this basis

from Vickery, Davis, Nix, or Weiner—all white jurors accepted by the prosecution for service on petitioner's jury.

Carroll Boggess. As with Warren, the State claimed it struck Boggess because of misgivings about the death penalty and a family member with a criminal record. JA 211. Like the other African Americans at issue here, however, Boggess expressed both support for the death penalty and confidence in her ability to impose it. JA 192, 204-05. Certainly, Boggess expressed no greater concern about the death penalty than white jurors such as Hearn and Mazza. Similarly, the State's contention that it was concerned that Boggess had served as a defense witness in a trial involving her nephew, JA 211, is belied both by its failure to mention this during her voir dire and the numerous white jurors with far greater family—or even personal—connections to criminal proceedings whom the State did not strike.

5. The trial court rejected petitioner's *Batson* claim. Its opinion focused solely on the State's actions during voir dire in this case, omitting any mention of the pattern and practice evidence introduced by petitioner. Despite the Court of Criminal Appeals' prior conclusion to the contrary, *see* JA 833-35, the trial court "remain[ed] convinced that . . . the evidence did not even raise an inference of racial motivation in the use of the State's peremptory challenges," JA 876. Deeming the State's explanations "completely credible," the court found "no purposeful discrimination by the prosecutor in the use of his peremptory strikes." JA 878.

In September 1992, the Court of Criminal Appeals affirmed petitioner's conviction and sentence of death. JA 880-97. The court reiterated its earlier statement that "a sufficiently disproportionate number of black veniremembers were removed by peremptory challenge of the State as to make a *prima facie* case of racial discrimination in the jury process." JA 881. The appeals court agreed with the trial court, however, that the State had provided "a racially neutral explanation reasonably related to the trial of this case." *Id.* The court did not examine, however, whether the totality of

the evidence—including the evidence introduced at the *Batson* hearing and the pattern and practice evidence introduced at the initial pre-trial hearing—supported a conclusion of purposeful discrimination by the State. Indeed, the court failed to address any of the pattern and practice evidence. Looking only at the evidence relating directly to the trial court proceedings, the court asked whether the State's explanations were "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." *Id.* The court concluded that petitioner had not satisfied this standard.

Federal Court Proceedings

1. Petitioner sought a writ of habeas corpus in federal district court. JA 898. The federal magistrate observed that petitioner had amassed a "considerable amount of evidence showing that the Dallas County District Attorney's office had an unofficial policy of excluding African-Americans from jury service in years past," and concluded that only a pattern and practice of discrimination in jury selection could explain "the appalling statistics brought to light by the *Dallas Morning News* in March 1986." JA 919. The magistrate considered evidence of such "historical" discrimination, however, to be "of limited value in assessing whether the race-neutral explanations articulated by the prosecutor were a pretext for discrimination *in this case*." JA 911 (emphasis in original). According to the magistrate, such evidence is "only relevant in determining whether petitioner has established a prima facie case under *Batson*" and does not bear on the ultimate question whether purposeful discrimination had occurred. JA 910-11.

Setting the pattern and practice evidence aside, the magistrate concluded that petitioner had not established as "unreasonable," 28 U.S.C. § 2254(d)(2), the state trial court's finding that "'the primary reasons for the exercise of the challenges against each of the veniremen in question, their reluctance to assess or reservations concerning the imposition of the death penalty, were closely related to the facts of the

case' and negated any inference of discrimination." JA 919-20. The magistrate therefore recommended that the petition be denied. JA 920.

The district court accepted the magistrate's recommendations and denied the petition. JA 942. The court subsequently denied petitioner's request for a certificate of appealability ("COA"). JA 948.

2. Petitioner then sought a COA from the United States Court of Appeals for the Fifth Circuit, which denied the request. *Id.* Quoting 28 U.S.C. § 2253(c)(2), the court noted that a COA should issue if "the applicant has made a substantial showing of the denial of a constitutional right." JA 955-56. The court also concluded, however, that in order to make that showing, petitioner was required to show, by "clear and convincing evidence," that the decisions of the state courts in this case were "unreasonable" under 28 U.S.C. § 2254(d). JA 958-59. The court rejected petitioner's argument that the state courts misapplied *Batson* by "fail[ing] to give proper weight and credit to the evidence . . . regarding the historical data evidencing exclusion of African-American jurors." JA 959-60. The court did not, however, discuss that evidence. Observing that state court findings are "entitled to great deference," JA 960, the court declared that "[t]he detailed factual findings made by the state trial court establish that each of the challenged African-American jurors was stricken on race-neutral grounds," *id.* Accordingly, the court held that the state court's findings were not "unreasonable," and that petitioner had failed to "present clear and convincing evidence to the contrary." *Id.* Having thus determined that it would reject petitioner's *Batson* claim on the merits, the court then held, without further analysis, that "this issue would not be debatable among jurists of reason" and thus that a COA should not issue. JA 960-61.

SUMMARY OF ARGUMENT

On the record of this case, petitioner has established not only entitlement to a COA, but also that the state courts'

denial of his *Batson* claim was "based on an unreasonable determination of the facts" in light of the evidence before them. 28 U.S.C. § 2254(d)(2).

I. The court of appeals applied the wrong legal standards to petitioner's request for a COA on his claim for federal habeas relief on *Batson* grounds. First, its decision to deny the COA appears to rest on nothing more than its own determination that petitioner was not ultimately entitled to relief. As this Court has explained, however, a habeas petitioner is entitled to a COA under 28 U.S.C. § 2253(c) if he shows that "reasonable jurists could debate" whether his petition contains merit, or that the petition "'deserves encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). The petitioner need not persuade the reviewing court that his claim is ultimately meritorious. By denying petitioner a COA on that basis, the court of appeals converted the COA process into the appeal itself, in clear violation of the text and purpose of section 2253(c).

Second, in evaluating the merits of petitioner's claim, the court of appeals erroneously compounded the requirement of section 2254(d)(2) with that of section 2254(e)(1). The former authorizes federal courts to grant habeas relief where the state court decision at issue was "based on an unreasonable determination of the facts" in light of the evidence before the state court. 28 U.S.C. § 2254(d)(2). The latter provides that a state court's factual findings shall be presumed correct in federal habeas proceedings, unless shown to be incorrect by "clear and convincing evidence." *Id.* § 2254(e)(1). The court of appeals' holding that habeas petitioners can prevail under section 2254(d)(2) only by adducing "clear and convincing evidence" that the state court's decision was based on "unreasonable" factual findings ignores the critical distinction between section 2254(d)(2)'s reference to *unreasonableness* and section 2254(e)(1)'s reference to *correctness*, a distinction whose significance this Court has

stressed. *See Williams v. Taylor*, 529 U.S. 362, 411 (2000). Moreover, it confuses the separate, though complementary, functions played by the two provisions. Section 2254(e)(1) establishes the quantum of evidence needed to rebut the presumed correctness of any individual factual finding made by a state court, while section 2254(d)(2) conditions federal habeas relief on a showing that the state court decision at issue was "*based on* an unreasonable determination of the facts." While each standard must be satisfied on its own terms, Congress plainly did not intend section 2254(e)(1) to heighten the requirements of section 2254(d)(2) in the fashion prescribed by the court of appeals.

II. The record in this case compels the conclusion that the state courts' denial of petitioner's *Batson* claim was "based on an unreasonable determination of the facts" in light of the evidence before them. The prosecution used ten of its fourteen peremptory strikes to remove 91% of the qualified African American veniremembers from petitioner's case, while striking only 13% of the qualified non-African Americans. In the face of this gross disparity, the prosecution offered with respect to six of its strikes of African Americans only patently pretextual explanations that applied equally to white veniremembers the prosecution did not strike. Those explanations are "simply too incredible" to be believed, *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality), when evaluated in light of (1) the longstanding and ongoing policy in the Dallas County DA's office to exclude African Americans from jury service, (2) overwhelming statistical evidence demonstrating an "appalling" pattern of such exclusions in serious criminal matters during the period at issue, and (3) additional evidence in this case that the prosecution attempted to exclude African Americans at each stage of the jury selection process. On this record, it is clear that the prosecution's peremptory strikes were impermissibly based on jurors' race. The state courts' contrary conclusion was based on a manifestly unreasonable assessment of the record.

Indeed, the evidence in this case is so overwhelming that only by granting the petitioner's claim for relief can this Court give full effect to its decision in *Batson*. It would not be enough to declare that petitioner's claim is "arguable" and that he is thus entitled to a COA. The record contains in abundance every kind of evidence of purposeful discrimination a petitioner could adduce. If state courts can reject *Batson* claims in the face of such evidence, then *Batson* risks becoming a dead letter. The Court should issue the writ to confirm that *Batson* continues to protect against unconstitutional race discrimination in jury selection.

ARGUMENT

I. THE COURT BELOW APPLIED INCORRECT STANDARDS TO PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY AND TO THE MERITS OF HIS CLAIM.

Section 2253(c)(1) of Title 28, United States Code, provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." Section 2253(c)(2) further provides that a COA "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." In denying petitioner's request for a COA on his *Batson* claim, the court of appeals misconstrued both the standard for a COA and the underlying standard governing petitioner's entitlement to federal habeas relief.

A. The Court Erred in Basing Its COA Analysis on Whether Petitioner Had Established Ultimate Entitlement to Relief.

As this Court has explained, a state prisoner whose habeas petition has been denied by a federal district court meets the standard for a COA if he shows that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner

or that the issues presented [are] 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). That is, a COA must issue where the petitioner "demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* Here, in denying petitioner a COA on his *Batson* claim, the court below focused not on whether "reasonable jurists could debate whether" the district court should have found for petitioner, but on its own conclusion that petitioner's claim lacked merit. That was error.

Petitioner's *Batson* claim asserts entitlement to federal habeas relief principally under 28 U.S.C. § 2254(d)(2). In particular, petitioner contends that the state trial court's rejection of his *Batson* claim "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* In denying petitioner's request for a COA on this claim, the court of appeals focused on its ultimate merits:

> We have now conducted an independent review of the findings of the state court and of the evidence presented by [petitioner] in his application. Suffice it to say, and without commenting on each of the challenged jurors and the reasons proffered for their being excluded, we find that the state court's findings are not unreasonable and that [petitioner] has failed to present clear and convincing evidence to the contrary.

JA 960. Having made those findings, the court rejected petitioner's claim on the merits, concluding that "the state court's adjudication [of petitioner's *Batson* claim] neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court." JA 960-61. Only after reaching that ultimate conclusion did the court declare—in less than one sentence and without any additional analysis—that a COA was not warranted. *Id.* The court did not explain why its own

determination that petitioner's claim lacked merit compelled the conclusion that no "reasonable jurist" could find otherwise. *Slack*, 529 U.S. at 484.

The court of appeals clearly erred in basing its denial of a COA on its own finding, without more, that the underlying claim lacked merit. The plain language of the statute, which is necessarily the starting point of the analysis, *see Williams v. Taylor*, 529 U.S. 420, 431 (2000), makes clear that entitlement to a COA turns not on whether a petitioner can establish ultimate entitlement to relief prior to appeal, but on whether he can make a "*substantial showing* of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2) (emphasis added), so as to warrant permitting him to appeal. This Court has described the analysis as a "threshold inquiry," *Slack*, 529 U.S. at 482, not a full review of the merits:

> In requiring a . . . substantial showing of the denial of [a constitutional] right, obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [differently]; or that the questions are adequate to deserve encouragement to proceed further.

Barefoot, 463 U.S. at 893 n.4 (internal quotations omitted, emphasis in original).[26] Indeed, the clear language of the statute establishes that a petitioner's entitlement to pursue an appeal is not conditioned on persuading the appellate court, in advance, that the appeal must ultimately prevail, but rather

---

[26] *Barefoot* addressed the standards for a certificate of probable cause ("CPC"), which was replaced in 1996 by the COA. This Court has made clear, however, that "[e]xcept for substituting the word 'constitutional' for the word 'federal,' section 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle*." *Slack*, 529 U.S. at 483. Accordingly, the Court has relied upon *Barefoot* when construing and applying the standard for a COA. *See id.* at 483-84.

on making a "substantial showing" of merit in the underlying constitutional claim. 28 U.S.C. § 2253(c)(2).[27]

By the same token, one court's determination that a habeas petitioner's underlying claim lacks merit is insufficient, without more, to establish that a COA should not issue. Instead, entitlement to a COA turns simply on whether the petitioner's claim is sufficiently plausible that it "'deserve[s] encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot*, 463 U.S. at 893). Were that not the case, only those habeas petitioners who ultimately prevail on appeal would be allowed to pursue an appeal in the first place, and the COA process would be converted, paradoxically, into the appeal itself.[28] That is precisely what the court of appeals did here: It first rejected petitioner's claim on the merits and then summarily concluded, on that basis and without any additional analysis, that petitioner had not made the requisite "substantial showing" for a COA. That approach cannot be reconciled with the text or purpose of the statute.[29]

---

[27] The Court has also stressed that where, as here, the petitioner has been sentenced to death, "the nature of the penalty is properly considered in determining whether to issue a [COA]." *Barefoot*, 463 U.S. at 893. The court of appeals displayed no such consideration in this case.

[28] Indeed, if mere rejection of the claim by a single federal court were sufficient, no COA would ever issue because every request for a COA is necessarily preceded by a federal court's rejection of the claims in the underlying petition. *See Barefoot*, 463 U.S. at 893 n.4. This point is most plain where, as permitted under Fed. R. App. P. 22(b)(1), the petitioner seeks a COA from the very court that has denied his petition.

[29] Alternatively, the plain meaning of the statutory text suggests that the court of appeals erred in including *any* of the standards found in section 2254(d) in its assessment of whether petitioner had satisfied the requirements for a COA under section 2253(c). The standard for a COA requires that the petitioner make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Read according to its terms, that standard is concerned not with whether the petitioner establishes that the state court decision at issue was "unreasonable" as required for relief to issue under section 2254(d), but simply with whether the petitioner makes a substantial showing that he was denied a constitutional right—i.e., that the state court's ruling on the underlying constitutional claim was incorrect. Under this alternative but plain reading of the statute's terms, in cases where the petitioner can make that showing he is entitled to appellate review of his claim, at which point he must satisfy the standards set forth in section 2254(d).

On this alternative reading, the court of appeals should have asked only whether petitioner made a substantial showing that his jury had been selected on the basis of race, not whether the state trial court acted unreasonably in concluding to the contrary. A number of courts of appeals have taken this approach. *See, e.g.*, *Cooey v. Coyle*, 2002 WL 552854 (6th Cir. Apr. 16, 2002); *Coady v. Vaughn*, 251 F.3d 480 (3d Cir. 2001); *Shayesteh v. City of South Salt Lake*, 217 F.3d 1281 (10th Cir. 2000). *But see, e.g.*, *McWee v. Weldon*, 283 F.3d 179 (4th Cir. 2002).

B. The Court Erred in Inserting Section 2254(e) into the Requirements of Section 2254(d).

Not only did the court of appeals erroneously base its COA analysis on a premature assessment of the underlying merits of petitioner's claim, but the court also applied the wrong standard for relief under section 2254(d)(2). The court stated that standard as follows: "[W]e are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. *And the unreasonableness, if any, must be established by clear and convincing evidence. See* 28 U.S.C. § 2254(e)(1)." JA 960 (emphasis added). That is, the court held that not only must a habeas petitioner seeking relief under section 2254(d)(2) establish that the state court decision at issue was based on an "unreasonable" determination of the facts in light of the evidence presented: according to the court, he must also prove the "unreasonableness" of that determination by "clear and convincing evidence." The court then concluded that petitioner had failed to establish unreasonableness by this heightened standard. JA 961.

This extreme formulation is based on a misreading of the statute. In addition to section 2254(d), which establishes alternative requirements that must be met before federal

habeas relief may be granted, the habeas statute contains a separate provision, section 2254(e)(1), which provides that "a determination of a factual issue made by a State court shall be presumed correct," and that a federal habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Although sections 2254(d)(2) and (e)(1) are related to the extent that they both refer to a state court's factual findings, nothing in their text or purpose supports the court of appeals' application of section 2254(e)(1)'s "clear and convincing" evidentiary standard to the requirement of "unreasonableness" set forth in section 2254(d)(2). Indeed, the error in that approach is clear from the statute's plain text. As noted, section 2254(e)(1) provides that state courts' factual findings "shall be presumed *correct*," and establishes the showing needed to rebut this "presumption of *correctness*." Because the presumption to be rebutted is one of correctness, plainly the requirement of "clear and convincing evidence" refers to evidence that the finding in question is *incorrect*. Yet in grafting section 2254(e)(1) onto section 2254(d)(2), the court of appeals divorced the "clear and convincing" evidentiary requirement from the presumption of correctness it is tailored to rebut, and treated it as requiring "clear and convincing" evidence of *unreasonableness*. That requirement misconstrues section 2254(e)(1).

Moreover, the court of appeals' approach ignores the fact that, as this Court has explained, Congress made a specific choice in section 2254(d) to "use[] the word 'unreasonable,' and not a term like 'erroneous' or 'incorrect.'" *Williams v. Taylor*, 529 U.S. 362, 411 (2000). The word choice is a significant one, for a finding is not necessarily unreasonable just because it is incorrect. *See id.* To insist that section 2254(d)(2)'s requirement of *unreasonableness* be established by means of a "clear and convincing" evidentiary standard contained in a separate provision focusing on *correctness* would be to ignore entirely

Congress's specific choice about how, and where, to employ those different terms in the statute.

Rather, sections 2254(d)(2) and (e)(1) are properly understood to articulate independent rules. Section 2254(e)(1) establishes the general rule in federal habeas proceedings that the factual findings of state courts shall be presumed correct, and it specifies that in order to rebut this presumption the petitioner must show the particular factual finding at issue to be incorrect by clear and convincing evidence. That is, section 2254(e)(1) instructs federal habeas courts how to treat individual findings of fact by state courts, without regard to the relationship between the particular factual finding at issue and the decision being challenged. Section 2254(d)(2), however, focuses on that precise relationship, and conditions federal habeas relief on a showing that the state court decision at issue was "*based on* an unreasonable determination of the facts." (emphasis added). The two sections are thus distinct, though complementary: Section 2254(e)(1) establishes that only those findings shown to be incorrect by clear and convincing evidence may be deemed incorrect in federal habeas proceedings, while section 2254(d)(2) provides that habeas relief may not issue for a factfinding error unless the state court's decision is *based on* an unreasonable determination of fact. *See Valdez v. Cockrell*, 274 F.3d 941, 951 n.17 (5th Cir. 2001); *Sanna v. DiPaolo*, 265 F.3d 1, 10 (1st Cir. 2001); *Torres v. Prunty*, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000).[30]

---

[30] Where a state court's decision depends upon factfinding that is incorrect by clear and convincing evidence that was presented to that court, the requirements of both section 2254(e)(1) and 2254(d)(2) are necessarily satisfied. Not only is the predicate fact shown to be incorrect by clear and convincing evidence, but the factfinding on which the decision is *based* is therefore unreasonable. As demonstrated below, that is the situation in this case. The factual determination on which the state courts' decision depended was their conclusion that the prosecutors did not exercise their peremptory challenges to exclude African Americans based upon their race. Because this determination was incorrect by clear

Here, the court of appeals improperly compounded the standard of proof with respect to correctness set forth in section 2254(e)(1) with the unreasonableness standard of section 2254(d)(2), thus concocting an inappropriate barrier to relief under the statute.

II. A WRIT OF HABEAS CORPUS SHOULD ISSUE BECAUSE THE STATE COURTS' RESOLUTION OF PETITIONER'S *BATSON* CLAIM WAS "UNREASONABLE" WITHIN THE MEANING OF SECTION 2254(d).

The evidence in this case far exceeds the requisite standard for relief under section 2254(d)(2)—that the state courts' denial of his *Batson* claim be based on an unreasonable determination of the facts before it. Indeed, the record establishes that it would be unreasonable to conclude that the rule of *Batson* was *not* violated during the selection of petitioner's jury.

A. *Batson* Claims Must Be Evaluated in Light of All Relevant Evidence.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court affirmed in part and overruled in part its earlier decision in *Swain v. Alabama*, 380 U.S. 202 (1965), regarding the application of the Fourteenth Amendment's Equal Protection Clause to claims of race-based discrimination in criminal jury selection. In so doing, *Batson* reaffirmed that the Equal Protection Clause protects a criminal defendant's "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." 476 U.S. at 85-86. More specifically, *Batson* confirmed that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that

---

and convincing evidence before the state courts, both section 2254(e)(1) and section 2254(d)(2) are satisfied here.

black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89.[31]

The *Batson* Court then outlined a three-step process for evaluating claims that the State violated the Equal Protection Clause by exercising peremptory challenges on the basis of race. First, the defendant must make a prima facie showing of purposeful race discrimination in the prosecution's exercise of its peremptory challenges. *Id.* at 96-97. As was the case under *Swain*, the defendant may make this showing by introducing evidence that the prosecution's conduct in the instant case was part of a historical, multi-case pattern of race-based discrimination in jury selection. *Id.* at 93-95. *Batson*'s departure from *Swain* is that while this sort of "pattern and practice" evidence can be sufficient to establish a prima facie case, it is no longer necessary. Rather, *Batson* also permits the defendant to establish a prima facie case by relying solely on evidence regarding the exercise of peremptory challenges at his own trial. *Id.* at 96. Second, if the defendant has made a prima facie showing by either (or both) of these methods, the burden then shifts to the State to provide a race-neutral explanation for striking the jurors in question. *Id.* at 97-98. Third, and critically, the trial court must finally determine whether, despite the State's purportedly race-neutral explanation, the defendant has nevertheless established "purposeful discrimination." *Id.* at 98. If so, then the defendant has established that the State's exercise of its peremptory challenges violated the Constitution.

In making the final assessment of "purposeful discrimination," the trial court may find that the evidence supporting the defendant's prima facie case is so strong that the prosecution's purportedly race-neutral explanations for its

---

[31] As the *Batson* Court observed, "[t]his principle ha[d] been 'consistently and repeatedly' reaffirmed, . . . in numerous decisions of this Court both preceding and following *Swain*." 476 U.S. at 84 (quoting *Swain*, 380 U.S. at 204); *see also id.* at 84 n.3 (collecting cases).

actions are "simply too incredible" to be believed. *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality); *see id.* at 375 (O'Connor, J., concurring in the judgment) ("Disproportionate [strikes of African-American jurors] may, of course, constitute evidence of intentional discrimination. The trial court may, because of such effect, disbelieve the prosecutor and find that the asserted justification is merely a pretext for intentional race-based discrimination."). In any event, the ultimate finding of purposeful discrimination must take into account *all* relevant evidence, including the evidence relied upon by the defendant to establish his prima facie case. *See Batson*, 476 U.S. at 93 (noting that a court determining the existence of "purposeful discrimination" must "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'") (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).[32] On this point, the *Batson* analysis is consistent with this Court's approach to claims of unlawful discrimination in other contexts. *See Hernandez*, 500 U.S. at 365 (likening *Batson* analysis to Title VII analysis). In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), for example, the Court explained that in the Title VII context, "[a]lthough the presumption of discrimination [created by the prima facie case] drops out of the picture once the defendant meets its burden . . . , the trier of fact may still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual." *Id.* at 143 (internal quotations omitted). Thus, only if the purportedly race-neutral explanations for the conduct in question outweigh the

32 Numerous lower courts have so held. *See, e.g., Riley v. Taylor*, 277 F.3d 261, 286 (3d Cir. 2001) (en banc); *McClain v. Prunty*, 217 F.3d 1209, 1220-21 (9th Cir. 2000); *Jordan v. Lefevre*, 206 F.3d 196, 200 (2d Cir. 2000); *Coulter v. Gilmore*, 155 F.3d 912, 921 (7th Cir. 1998); *United States v. Hill*, 146 F.3d 337, 342 (6th Cir. 1998).

totality of evidence supporting a finding of discrimination can a court reject a claim of purposeful discrimination. *Id.*

B. The State Court's Resolution of Petitioner's *Batson* Claim Was Based on an Unreasonable Determination of the Facts in Light of the Evidence Presented.

The issue in this case focuses on the third step of the *Batson* analysis. The first two requirements of *Batson* are clearly met here: the extreme racial disparity in the State's use of its peremptory strikes suffices by itself to establish a prima facie case, as the Texas Court of Criminal Appeals correctly concluded (*see* JA 833, 880),[33] and the State satisfied *Batson*'s second step by offering facially neutral explanations for those peremptory strikes, without regard to the truth or persuasiveness of those explanations, *see Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (per curiam). The result here thus turns on step three of the *Batson* analysis, and on whether, as required by section 2254(d)(2) of the habeas statute, the state trial and appellate courts' finding of no "purposeful discrimination" was based on an

33 *See also, e.g., Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th Cir. 2002) (finding prima facie case where Hispanics comprised 12% of venire and 21% of challenges made were against Hispanics); *Mahaffey v. Page*, 162 F.3d 481, 484-85 (7th Cir. 1999) (finding prima facie case where State used seven of thirteen strikes against African American veniremembers); *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993) (finding prima facie case where rate of minority exclusion was 75%, four times percentage of minorities on venire); *United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991) (finding prima facie case where challenge rate for minorities was "twice the likely minority percentage of the venire"); *see also State v. Martinez*, 42 P.3d 851, 858-59 (N.M. 2002) (listing cases holding that, "as a matter of law, a disproportionate number of strikes against a particular group creates a prima facie case of discrimination"). Moreover, the pattern and practice evidence submitted by petitioner in this case (discussed *supra* at 6-8 and *infra* at 45-47) also establishes a prima facie case of discrimination under *Batson*. *See United States v. Hughes*, 864 F.2d 78, 80 (8th Cir. 1988) (holding that, under *Batson*, history of exclusion is a relevant factor in deciding whether the defendant has established a prima facie case).

"unreasonable determination of the facts in light of the evidence" that was before the state trial court.

Clear and convincing evidence in the state court record compels the conclusion that the State engaged in purposeful race-based discrimination during jury selection in petitioner's case. The state trial and appellate courts, however, did not take proper account of that overwhelming evidence.

First, the state courts did not give adequate consideration to the extreme racial disparity in the prosecution's exercise of its peremptory strikes or to the weakness of the State's proffered explanations for the strikes. Every African American veniremember removed by a peremptory challenge was removed by the prosecution. Indeed, the prosecution used its peremptory strikes to remove ten of eleven, or 91%, of the qualified African American veniremembers, in contrast to only four of thirty-one, or 13%, of the similarly situated non-African American members of the venire. *See supra* at 6, 20. Thus, African Americans were seven times more likely than non-African Americans to be peremptorily removed by the prosecution. Looked at another way, the prosecution used ten out of fourteen, or 71%, of its peremptories on African Americans, even though African Americans comprised only 26% of the veniremembers not removed for cause or by agreement. Thus, the prosecution exercised almost three times more peremptories on African American veniremembers than one would have expected had race not played a role in their exercise.

The state courts essentially concluded that this was all a coincidence. But the extent of the statistical disparitities themselves powerfully suggests that "chance or accident could hardly have accounted for" them. *Hill*, 316 U.S. at 404. Indeed, the fact that African Americans were *seven times* more likely than non-African Americans to be peremptorily struck by the prosecution is the kind of "proof of discriminatory impact" that "for all practical purposes demonstrate[s] unconstitutionality" because it is so "difficult to explain on nonracial grounds." *Batson*, 476 U.S. at 93

(internal quotations omitted); *see Hernandez*, 500 U.S. at 375 (O'Connor, J., concurring in the judgment) (noting that "[d]isproportionate [strikes] may, of course, constitute evidence of intentional discrimination."). If such a disparity *is* to be successfully defended at step three of the *Batson* analysis, however, the State's proffered explanation must be sufficiently "persuasive[]" to survive all the evidence tending to demonstrate that it engaged in purposeful discrimination when exercising its peremptories. *Purkett*, 514 U.S. at 768.

As this Court has explained, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Id.* That is the appropriate conclusion here, where *none* of the State's purportedly race-neutral explanations provides a credible basis for distinguishing between African Americans struck by the State and non-African Americans not struck by the State. Although petitioner makes out a complete *Batson* claim if he can show that *any one* veniremember was excluded from the jury because of purposeful discrimination, *see Batson*, 476 U.S. at 95, here the State's proffered race-neutral reasons for its strikes are inadequate to justify any of *six* peremptory strikes at issue. In fact, *every one* of the reasons proffered by the State to justify each of those six peremptory strikes applied equally to white veniremembers not removed by the State. *See supra* at 21-26.

This pattern of invoking certain characteristics to strike African American jurors when the same characteristics are ignored in white jurors presents a textbook case of "pretext." *Hernandez*, 500 U.S. at 363.[34] Indeed, especially in light of

---

[34] *See McClain*, 217 F.3d at 1220-21 ("A prosectuor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge."); *Coulter*, 155 F.3d at 921 ("A facially neutral reason for striking a juror may show discrimination if that reason is invoked only to eliminate African-American prospective jurors and not others who also have that characteristic."); *see also Berry v. State*, 728 So. 2d 568, 572 (Miss. 1999) ("One of the recognized indicia of pretext is

the extreme statistical disparity in the State's use of its peremptory challenges, these inconsistently applied rationales are "simply too incredible" to be believed, *id.* at 369, and must be rejected. *See, e.g.*, *McClain*, 217 F.3d at 1222-23 (rejecting explanations regarding decision-making experience and education levels of African American veniremembers where explanations also applied to whites not excluded); *Jones*, 987 F.2d at 973-74 (rejecting as pretext the explanation that unmarried African American women were struck to eliminate possibility of attraction with defendant, where unmarried white women were allowed to serve); *see also Berry*, 728 So. 2d at 568 (finding pretext where State said it struck African American juror for being a housewife and similarly situated white juror was allowed to serve); *People v. Morales*, 719 N.E.2d 261 (Ill. 1999) (finding State's reference to African American veniremember's concern about length of trial was pretext, where State permitted white veniremember with same concern to serve).

Moreover, the State's contention that the racial disparity here was coincidence—and its race-neutral explanations genuine—evaporates when confronted by the overwhelming record evidence of Dallas County prosecutors' continuing, longstanding policy and practice to exclude African Americans from jury service. Examining this pattern and practice evidence is critical to a "sensitive inquiry" into all relevant evidence. *Batson*, 476 U.S. at 93 (quoting *Arlington Heights*, 429 U.S. at 266).[35] Yet the state trial and appellate courts ignored it entirely.

---

disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge.") (internal quotations and citations omitted).

[35] Courts long relied upon such evidence under *Swain*. *See, e.g.*, *Horton v. Zant*, 941 F.2d 1449, 1455 (11th Cir. 1991) (*Swain* violation where, *inter alia*, defendant introduced statistical analysis of prosecutor's strikes, along with evidence that prosecutor had authored "memo designed to underrepresent blacks, women, and all individuals 18-24 years old" and had engaged in "questionable tactics" in prior case); *Love v. Jones*, 923 F.2d 816 (11th Cir. 1991) (*Swain* violated where, *inter alia*, defendant introduced testimony from lawyers who had observed a pattern and practice by DA's office of striking blacks from jury venires); *State v. Washington*, 375 So. 2d 1162 (La. 1979) (*Swain* violation where, *inter alia*, defendant introduced evidence of prosecutor's practice of striking African Americans). And, as noted *supra* at 40-41 & note 32, *Batson* continues to require an assessment of all relevant evidence.

The pattern and practice evidence—including the testimony of Dallas County judges and attorneys, official DA's office training materials, and the uncontested statistical analyses contained in the *Dallas Morning News*—establishes irrefutably that at the time of petitioner's trial, the Dallas County DA's office continued to pursue a longstanding policy of racial discrimination in jury selection. Indeed, the evidence confirms that the DA's office actually *trained* its prosecutors—including those who conducted jury selection in this case—to exclude African Americans from jury service, and that the policy was enforced with threats to fire those who disobeyed. *See supra* at 6-7.[36] Prosecutors pursued this exclusionary policy in a number of ways. Judge Entz, for example, testified to prosecutors' use of jury shuffles to minimize the chance that African American veniremembers would be called for voir dire. *See supra* at 7. And Judge Baraka testified that as recently as the year before

---

[36] The state courts' failure to consider petitioner's pattern and practice evidence during the third stage of the *Batson* analysis constituted an independent violation of 28 U.S.C. § 2254(d)(1). A state court decision violates section 2254(d)(1) if it "involve[s] an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States." In this context, it is clear that the third stage of the *Batson* analysis should take into account all relevant evidence in the case. *See Batson*, 476 U.S. at 93 (noting that a court determining the existence of "purposeful discrimination" must "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'") (quoting *Arlington Heights*, 429 U.S. at 266). This is the clear teaching of *Batson* itself. *See Coulter*, 155 F.3d at 921 ("The *Batson* decision makes it clear that, one way or another, a trial court must consider all relevant circumstances before it issues a final ruling on a defendant's motion."). The state court's failure to consider petitioner's pattern and practice evidence was thus an unreasonable application of *Batson* itself.

petitioner's trial, a Dallas County prosecutor exercised his peremptory strikes in such a blatantly racist fashion that the judge felt obliged to ban the prosecutor from conducting similar voir dires in his courtroom in the future. *See supra* at 7-8. The result of these ongoing discriminatory tactics, as the *Morning News* documented, was that African Americans accounted for fewer than 4% of the jurors who served on felony trials in Dallas County between 1980 and 1986. *See supra* at 4-5. Moreover, 92% of the African American veniremembers removed by peremptory strikes during that period were removed by the prosecution. *See supra* at 4.[37]

In this case, *all* of the African American veniremembers removed by peremptory strikes—and 91% of the qualified African American veniremembers overall—were struck by the prosecution. Indeed, African Americans were *seven times* more likely than whites to be peremptorily struck by the prosecution in this case. These statistical disparities accord with the disparities across all Dallas County cases reported by the *Morning News*, and confirm that the prosecutors in this case used their peremptory challenges to do precisely what the Dallas County DA's office had been training its prosecutors to do for years: exclude African Americans from criminal juries.

The state courts' conclusion that the prosecution acted without regard to jurors' race is still more indefensible in light of the prosecution's use of racially discriminatory tactics in other stages of the jury selection in this very case. For example, the prosecution here employed jury shuffles in precisely the discriminatory fashion that Judge Entz had observed in past cases. When faced with randomly selected venire pools presenting African Americans toward the front, the State asked that the pool be shuffled. *See supra* at 11-12.

---

37 Additionally, the Texas courts have concluded that the very prosecutors in charge of voir dire in this case were involved in the use of racially discriminatory jury selection tactics in other cases in the mid-1980s, at roughly the same time as petitioner's trial. *See supra* at 5.

It obtained the desired result: fewer African Americans appeared near the front of the venire and more were toward the back, thus diminishing the likelihood that they would even be subject to voir dire. And when in one instance the defense's exercise of its right to re-shuffle the pool caused African Americans to return to the front, the prosecution immediately cried foul, insisting that it be allowed yet another shuffle even though the law did not authorize it—and even though the alleged "foul" precisely described the prosecution's *own* conduct during previous shuffles. JA 60 The State's evident effort to remove African Americans through the jury shuffle strongly reinforces the conclusion that it persisted in that goal when exercising its peremptory strikes.

So too does the State's consistently disparate questioning of African Americans during voir dire. African American veniremembers were nearly ten times more likely than white veniremembers to be subjected to initial questioning about the death penalty that focused on the explicit details of lethal injection, *see supra* at 13-16,[38] and they were similarly far more likely to be questioned about the minimum sentence in a manner that attempted to disqualify them, *see supra* at 17-20. And based on this questioning, the State moved to have fully 60% of the African Americans subjected to voir dire removed for cause. The State's conduct during voir dire, like

---

38 The evidence shows that the prosecutors in this case were operating on the impermissible assumption that African Americans would "be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S. at 80. To defend against this inevitable conclusion, the State has repeatedly noted that one African American, Troy Woods, served on the jury. But the inclusion of one African American hardly accounts for the exclusion of ten others, and it certainly cannot immunize the rest of the State's actions from constitutional scrutiny. *See Fernandez*, 286 F.3d at 1078; *Jones*, 987 F.2d 960. Moreover, as discussed above, the State accepted Woods only out of a perceived necessity, after hearing his extreme support for the death penalty, and even then only after some deliberation. *See supra* at 20-21.

its use of the jury shuffle, is highly probative of the intent behind its peremptory strikes. *See Batson*, 476 U.S. at 97.

In sum, the record in this case shows unmistakably that the State attempted first through jury shuffles to minimize the number of African Americans subject to voir dire, and then through voir dire and for-cause challenges to minimize the number of African Americans qualified for jury service. To conclude that the State then abandoned this strategy of race-based exclusion when exercising its peremptory strikes against virtually all the remaining African Americans would be "fantastic" indeed, *Purkett*, 514 U.S. at 768, especially in light of the extreme statistical disparity in those strikes, the prosecutors' implausible attempts to rationalize the disparity, and the fact that the prosecutors had been expressly trained to exclude African Americans from jury service. The cumulative evidence in this case is clear and convincing, and it permits only one reasonable conclusion: The prosecution's use of its peremptory strikes to remove 91% of the African Americans eligible to serve on petitioner's jury was the product of purposeful discrimination.

C. The Court Should Direct Issuance of the Writ.

The record in this case plainly satisfies the standard of section 2254(d)(2): the state courts' denial of petitioner's *Batson* claim was "based on an unreasonable determination of the facts in light of the evidence presented in the State [trial] court proceeding." This Court should therefore grant the relief petitioner seeks.

First, this Court should confirm that a factual record like the one in this case does indeed establish a *Batson* violation. If a court could reject *this* challenge, then there is essentially no case—short of one in which a prosecutor provides an on-the-record confession of purposeful discrimination—in which an appellate court can overturn an adverse factual finding in this area. The Court should therefore reverse the judgment below and direct issuance of the writ to make clear

to federal and state courts the quantum and nature of evidence that *require* reversal on *Batson* grounds.

The Court took a similar approach in *Slack*. The Court granted certiorari in that case to review a lower court's denial of a COA. The Court did not, however, limit its analysis to whether the petitioner's claim was sufficient to warrant issuance of a COA. Rather, after observing that the full merits of the issue had been discussed in the briefs, *see* 529 U.S. at 485, the Court determined not only that the petitioner had met the standard for a COA, but that he was correct on the merits.[39] The Court thus took the opportunity presented in *Slack* to clarify an important area of habeas law even though the case was formally before the Court in a more preliminary posture. So too here, the Court should reach and rule on the merits of petitioner's *Batson* claim (as expressed through section 2254(d)(2)) in order to clarify the kind of evidentiary record that warrants habeas relief in this area. If the lower courts are led to believe that this case presents no more than an arguable *Batson* violation (as is required for a COA to issue), other instances of discriminatory jury selection with less blatant records may go unremedied.

More fundamentally, if this record does not establish a *Batson* violation, then the burden on defendants in this area is just as "crippling" as it was under *Swain*, whose unduly burdensome standard *Batson* was designed to redress. *Batson*, 476 U.S. at 92. The standards this Court articulated in *Batson* were designed to "enforce[] the mandate of equal protection and further[] the ends of justice" by "requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges." *Id.* at 99. "In view of the heterogeneous population of our Nation," the Court

---

39 *See Slack*, 529 U.S. at 489 ("Slack has demonstrated that reasonable jurists could conclude that the District Court's abuse of the writ holding was wrong, for we have determined that a habeas petition filed after an initial petition was dismissed under *Rose v. Lundy* without an adjudication on the merits is not a 'second or successive' petition.").

observed, "public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Id.* In this case, there is *both* the kind of systemic historical discrimination on which *Swain* turned *and* manifest case-specific evidence of discrimination and pretext. If state courts are permitted to reject *Batson* claims even in the face of such combined evidence, then *Batson* risks becoming a dead letter. The Court should grant the petition in this case to confirm *Batson*'s continuing force.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and grant the petition for a writ of habeas corpus.

Respectfully submitted,

JIM MARCUS
Counsel of Record
ELIZABETH DETWEILER
ANDREW HAMMEL
TEXAS DEFENDER SERVICE
412 Main Street
Suite 1150
Houston, TX 77002
(713) 222-7788

SETH P. WAXMAN
DAVID W. OGDEN
ROBIN A. LENHARDT
TREVOR W. MORRISON
NICOLE C. HERRON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Petitioner

MAY 2002

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2253(c) of Title 28, United States Code, provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Sections 2254(d) and (e)(1) of Title 28, United States Code, provide:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

APPENDIX B

(Excerpts of voir dire testimony)

* * * *

[2675] to try to stay around and go naturally, you know. I hope everybody else has the same idea in mind, but, you know, as far as just — if that man is executed there, you know, and you knowing that you was one of the twelve that actually had a hand in it, you know, obviously it's going to make you feel something.

Q Right. Right. Well, let me just try to kind of summarize what we've talked about, Mr. Mosley, and you correct me if I say anything wrong or say anything that you don't agree with. Let me ask you one other question. Have you felt this way about the death penalty for quite a long time?

A Yeah, ever since they first passed the deal, the law, whatever it was. You know, I just don't feel like it's just right from the beginning for anybody else to judge a man — take his life and call it legal.

Q Okay. Under any circumstances?

A Under any circumstances.

Q So you've felt this way for a long time and you feel that the death penalty is just not right and you can't have a hand in assessing in executing somebody?

[2676] A That's right.

Q Mr. Mosley,the last thing I want to do and the last thing anybody here should try to do is argue with you and change your mind. I'm not going to try to do that. I guess from what you've told me, even if I tried to, I couldn't. I mean, I could stand here and play lawyer with you and argue with you and switch things all around, but I'm not going to change your feelings about this, am I?

A No.

Q Okay. Those feelings that you've held for a long time, you're not going to change them today; is that right?

A That's right.

Q Well, Mr. Mosley, from what you're saying am I correct that you would refuse to take the oath to serve on this jury then knowing what your job would be; is that right?

A That's right. If I'm going to take the oath as far as the death penalty is concerned, yeah.

Q You understand, by taking that oath, you're saying that if the facts and circumstances justify it, I'll give the death [2677] penalty?

A If that's what the oath is about, well then, like I say, I would justly fear that taking the oath is not helping my conscience and it's not helping him.

Q That's fine. There's nothing illegal about not talking that oath. The law says that it is your option as a juror whether you take that oath or not. There's nothing illegal about not taking it. You have told me that you would refuse to take it and I believe you, Mr. Mosley. I'm not going to bother you any more. I'm not going to talk with you any more. I don't see any point in it. You've been very clear in expressing your feelings to me and I appreciate that. I appreciate your talking with me and being patient with me as we've gone through all this stuff. I appreciate your time very much. These lawyers will probably have some questions for you. They won't argue with you or try to change your mind, either.

MR. NELSON: Your Honor,we'll pass the juror and will submit the juror.

* * * *

[2738] THE COURT: I understand that. You don't have to change your feelings, but could you still answer those questions knowing what would happen to this man over here?

MR. MOSLEY: I would still have my feelings. I can't live with that.

THE COURT: But could you answer the questions if that's what the law and the evidence told you —

MR. MOSLEY: Yes. To go along with the law, I would do everything I possibly could to — but I wouldn't feel right knowing that I —

THE COURT: What you're saying is this: Regardless of how you feel, you would still base your verdict on what the evidence was and what the law was. That wouldn't change how you feel about the whole thing, but you [2739] would do your duty; is that what you're saying?

MR. MOSLEY: Say that again.

THE COURT: Are you saying that regardless of how you feel about it, you would do your duty and it wouldn't change how you feel, but you would do what the law and the evidence told you you had to do?

MR. MOSLEY: Right. I do what the law and the evidence tells me to do, but it's just hard to change my feelings.

THE COURT: Well, no one is asking you to change your feelings.

MR. MOSLEY: That is what I'm saying. I'm not saying nobody is asking me to do it, but I'm just answering you.

THE COURT: Going back to square one, what I brought you back in here for, you could take that oath to start out with —

[2740] MR. CUNNINGHAM: Your Honor, could you ask Mr. Mosley to step

outside?

THE COURT: Let me ask you to go out in the hall for a second while we argue some more law? We're going to get this law question resolved.

(Whereupon, Mr. Mosley left the courtroom, after which the following proceedings were held.)

THE COURT: I'm ready to rule. Have you-all got something?

MR. CUNNINGHAM: Sixty-one for sixty-four.

THE COURT: When is sixty-four coming in?

MR. CUNNINGHAM: A probation officer. I think the Court will agree that's probably —

THE COURT: Yes. Try to get a hold of Ms. Goeters and head her off. Have Mr. Mosley come back in, please.

[2741] (Whereupon, Mr. Mosley returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Mosley, we're going to excuse you from service in this case which means you won't be required to serve on this jury. We appreciate your patience with us this morning and your answers. I think I understood what you were saying very well. I don't think anybody here doubts how you feel, so you have my thanks.

First of all, I apologize, Ms. Williams, for being so late and so long in getting you in. Sometimes it goes very slowly. One of our other jurors took quite a bit of time to talk to. I would like to ask you, as much as possible, to make yourself comfortable and relax. As I said, I've got a

* * * *

[4328] about the death penalty, the fact that you couldn't kill somebody. Did you have those feelings even before he started getting into trouble?

A I think I've always had those feelings.

Q Okay. I hope you understand that no one here is trying to change those feelings. We're just trying to --

A I understand.

Q I guess what we're trying to do is get them down on paper for the court reporter and the Judge and make sure that we're clear on everything because I'm certainly not going to

argue with you and these lawyers over here shouldn't argue with you because I think you've made it very clear how you feel about things.

Just to kind of wrap things up, I want to try to summarize, if I can. You correct me if I say anything that you disagree with or I say anything that is wrong. You've told us that you've felt all your life basically that you can't be involved in killing another human being unless it is to save your own life; is that right?

[4329] A Yes.

Q Also because you have a son who has been in some trouble, you feel sympathy or whatever word you want to use for his family and the situation they're in and it is because of those things that you don't feel like you can sit on this jury and be part of sentencing a man to die; is that right?

A Right.

Q Ms. Keaton, based on that, if you were given a choice, which you will be, whether to take the oath or not take the oath to sit on this jury, would you refuse to take the oath and say, I just can't do it, Judge? Again, there's nothing great about serving on the jury and nothing bad about not serving. We just need to know because, if you don't feel like you can in good conscience sit on that jury and answer these questions,then no one is going to make you.

A I don't think I could.

Q Okay. So you would prefer not to take the oath; is that right?

A Right.

Q Ms. Keaton, we've been talking [4330] here for a half an hour or maybe a little bit more and no one is going to argue with you and, if I tried, I couldn't change your mind, could I, couldn't change your feelings about these things?

A No, you couldn't change my feelings.

Q No one is going to play lawyer with you and no one is going to try to change your feelings and no one should

argue with you. I think you've made them very clear. These lawyers over here may have some questions for you, but I'm sure they aren't going to argue with you or try to change your mind. By telling me what you've told me, I think it's pretty clear how you feel and I appreciate your honesty with me and your patience with us, also. Thank you very much, Ms. Keaton, and I've enjoyed talking with you.

MR. NELSON: Your Honor, I'll pass the juror and also submit the juror.

MR. CUNNINGHAM: Your Honor, we have a legal question we need to take up.

[4331] THE COURT: Okay. The best way to do this is maybe give you a little chance to get off the witness stand. I need to take a law question up with these lawyers, so let me ask you to step out in the hall.

(Whereupon, Ms. Keaton left the courtroom, after which the following proceedings were held.)

MR. CUNNINGHAM: Your Honor, we believe that Ms. Keaton is qualified through Wainright versus Wick, in that the State has not shown; one, that she could not take the oath; two, she has not said that she would automatically vote no to one of those questions to keeping him from getting the death penalty. Her last answers with respect to the oath were, "I don't think I could", "I would prefer not to." She has not positively stated "I will not take

* * * *